

>> such as deadly weapon were not defined at that time. Kennedy, which was ruled upon after the penal code was revised, did not address the seeming contradiction between the pre- and post-penal code versions of robbery. The Court noted that “no amount of intent or intimidation by a robber can turn a toy gun, or a stick, or a finger in the pocket into a deadly weapon as it is currently defined. The subjective belief of the victim cannot do so, either. To the extent that it contradicts the current statute, the Court overruled the decisions in Merritt and Kennedy, concluding it was time to take a “fresh look” at the meaning of “armed with a deadly weapon.”

The Court agreed that there are two ways to look at the language in question — whether it was necessary to consider the operability of the specific weapon in question, or whether it was more appropriate to consider the class of weapons to which the item belongs in general. Because the statutory language was not clear, the Court looked next to the legislative intent. It found no difficulty in reaching the conclusion that the legislature intended the latter meaning and “must have intended to refer to pistols in general.” The Court found no reason to believe that the legislature would have intended that a savvy robber escape the consequences of first-degree robbery simply by leaving a weapon unloaded.

The Court reiterated, though, that a toy gun or water pistol, as a class, is not a deadly weapon, since as a class, such items could not cause death or serious physical injury. Further it noted that in most cases, the weapon is not immediately discovered so it would normally be impossible to prove or disprove that a particular weapon was operable at the time of the robbery. In such cases, the Court agreed that the victim’s representation of the weapon as real would be enough, absent proof to the contrary. The Court agreed that in the case at bar, the weapon was a deadly weapon under current law and Wilburn was properly convicted of robbery in the first degree.

In Gamble v. Com., 319 S.W.3d 375 (2010), decided just a few months after Wilburn, the Court considered whether an assertion

by Gamble during a bank robbery that he had a gun, although he did not show it to the teller, was sufficient to uphold his conviction for first-degree robbery. When Gamble was apprehended a short time after the crime, no gun was recovered. He denied that he made any specific threats or that he had a gun. Gamble was actually indicted not under the “armed with a deadly weapon” provision of first-degree robbery but that he “used or threatened to use a dangerous instrument.” The Court agreed that Gamble’s threats “amounted to threatening the immediate use of a gun.” (The issue of the credibility of the teller’s assertions, and Gamble’s denial, was a question for the jury, which clearly found that Gamble did, in fact, make the threats.) Gamble cited the case of Williams v. Com., 721 S.W.2d 710 (Ky.1986), in which the court differentiated between a suggestion and an explicitly stated threat that a robber had a gun, when he gestured at a bulge in a pocket. The Court upheld his conviction for robbery in the first degree.

Taken together, Wilburn and Gamble emphasize the

need for law enforcement officers to get a clear idea from robbery victims as to precisely what they saw and what was said during the course of the robbery. Wilburn teaches that if a firearm is real, first degree charges will be appropriate, even against assertions that the weapon was unloaded or even potentially inoperable. However, if what is brandished is clearly not a real weapon, but a toy or a fake, a first-degree charge is not supported. Gamble instructs, however, that if a firearm (or other deadly weapon) is not shown, but its use only explicitly threatened, a first-degree conviction may be successful under the dangerous instrument subsection of KRS 515.020. And, of course, if first-degree charges cannot be successfully prosecuted, second-degree robbery charges can be brought instead, and certainly they should be instructed to the jury. 🍷

